

² *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The ALJ accurately set forth the facts and circumstances surrounding the claimant's fatal automobile accident which occurred on November 13, 2003. This Board Member adopts that detailed recitation of facts as its own, to the extent that it is consistent with the majority's opinions and conclusions found herein. Only those facts relevant to the Board's findings will be restated.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.³ A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."⁴ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁵

K.S.A. 2002 Supp. 44-508(f) provides in pertinent part:

The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2002 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.⁶ In

³ K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁴ K.S.A. 44-501(a).

⁵ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁶ *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

Thompson, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.⁷

But K.S.A. 2002 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.⁸ Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.⁹

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.¹⁰ It is this exception that is at the heart of this claim.

In *Messenger*, the claimant was killed in a truck accident "on the way home from a distant drill site" and the court was asked to decide whether claimant's claim was compensable or barred by the going and coming rule. The *Messenger* Court noted that it was customary in the oilfield industry for the employer to pay the driller to drive and to transport his crew.¹¹ The employer also provided the employee with a company vehicle which he was allowed to take home and drive to the work site each day, thus furthering the employer's interests.¹² It was also important that the employee had no fixed work site.¹³

⁷ *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

⁸ *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

⁹ *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

¹⁰ *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

¹¹ *Id.* at 440.

¹² *Id.* at 439.

¹³ *Id.*

Two other cases that discuss this travel exception are *Kindel*¹⁴ and *Foos*.¹⁵ In *Kindel*, the claimant was “expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor.”¹⁶ But on the day in question, the claimant and his supervisor were on their way home when they stopped at a local club where they became inebriated. After leaving the club, the two were involved in an automobile accident. The *Kindel* Court was asked whether an employee’s personal or non-business-related activity would be considered a deviation from the employer’s work. Absent the deviation to the club, the claimant’s trip home with his supervisor was considered compensable under the travel exception.

Similarly, in *Foos*, the claimant was hired as a pest control technician and was provided a vehicle to use on his route. His job required him to regularly drive from his home to each of his accounts along his route and back again. On the day of his accident, claimant was on his way home to Solomon, Kansas after taking a deviation from his normal route to participate in a golfing contest. The Kansas Supreme Court concluded that claimant had returned to his employment and was engaged in traveling on a public highway, an activity contemplated by his employer, and thus, his accidental injury arose out of and in the course of his employment.¹⁷

Here, the ALJ concluded that while claimant was “required to travel” in order to catch a ride to the rig location, this requirement was “arguably no different for [c]laimant than any other employee who is expected to make his way to work each morning, and home each evening.”¹⁸ He went on to explain his reasoning as follows:

The element of mutual benefit to the employer and employee, elevating travel to “a necessary incident to the employment,” is problematic. Arguably, the presence of every employee contributes something of value to the workplace. If not, the employee would be terminated. The employer benefits from the employee’s labors, and the employee benefits from the compensation he earns for those labors. By this yardstick, travel is intrinsic to every employment, as virtually every employee must travel to and from the workplace. If every employee who travels to work is excluded from the scope of the “going and coming rule,” the rule has no meaning, and the legislature’s intent has been nullified.¹⁹

¹⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

¹⁵ *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004).

¹⁶ *Kindel*, 258 Kan. at 277.

¹⁷ *Foos*, 277 Kan at 692.

¹⁸ ALJ Order (Feb. 28, 2007) at 3.

¹⁹ *Id.*

No doubt in response to this reasoning, the claimant argues that there is a long history of case law involving oil field drilling crews that suggests, at least in claimant's counsel's view, that the mere fact that claimant was an oil field worker who had to drive or be driven to a site transforms any injury to a compensable event.²⁰ The ALJ disagreed and likened this fact scenario with that in *Butera*.²¹ *Butera* involved a pipe fitter who relocated from his home state to a town closer to his assigned work site, establishing residence at a local hotel and commuting each day to the nuclear plant where he was working. When he suffered injury on the way to work one morning, his employer disputed compensability of his claim based upon the "going and coming" rule. The *Butera* Court stated the following:

Travel itself was not part of Butera's job as a fitter, as it would be when one's job is to pick up a crew or visit accounts. Butera relocated to temporary quarters for the sole purpose of shortening his commute. While he was reimbursed for the hotel, he was not specifically reimbursed for his reduced commute once he relocated to the hotel residence. His off-hours activities were not under Fluor's supervision, and he was not expected to accomplish anything on behalf of Fluor during his off-time. Butera, at the moment he was injured, faced no greater risk than other commuters who were traveling from their permanent residence. Similarly, Fluor did not enjoy some benefit over an above what it would have received had Butera been a local resident.²²

The ALJ concluded that -

... like the commuting worker in *Butera*, [italics added] [c]laimant here was not paid to drive as part of his employment. Nor does it appear that [r]espondent enjoyed any particular benefit from [c]laimant's commute, over and above his normal services as an employee. At the time of his accident, [c]laimant faced no greater risk than other commuters on the same highway. He was simply driving home at the end of the work day, after having been dropped off in Rush Center by his driller.²³

Accordingly, the ALJ denied claimant's claim for benefits as his injury occurred while on the way home from his work duties.

²⁰ Claimant's Submission Brief at 5-6 (filed Feb. 21, 2007).

²¹ *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

²² *Id.*

²³ ALJ Order (Feb. 28, 2007) at 4-5.

This Board Member has considered the record as a whole and agrees with the ALJ's analysis. Admittedly, this is a difficult fact scenario. Claimant was hired with the specific understanding that he would have to travel from his home in Kinsley, Kansas to Rush Center, Kansas, where he would meet with his supervisor and ride with the other hands in the vehicle driven by the supervisor. The supervisor was paid mileage for these trips to and from Great Bend, Kansas (where the supervisor lived) and the rig. Claimant was not required to travel with his supervisor, but under no circumstances would claimant be paid mileage for his travel. Claimant's commute from his home to the rig site was made in whatever means of travel and expense claimant could arrange. It just so happened his supervisor was willing to take him provided claimant drove himself to Rush Center, Kansas.

Simply because claimant is an oil field worker does not, in this member's view, transform claimant's accident into a compensable event. The cases claimant cites simply do not stand for that legal proposition. Similarly, *Mendoza*²⁴ does not further claimant's legal position in this matter as *Mendoza* is a case involving a "work related errand" something that is not involved in this case at all.

Like the ALJ, this Board Member finds that resolution of this case turns upon several facts. Here, claimant specifically agreed that he would not be compensated for his travel time and that no mileage would be paid to him driving to and from the rig site. While he was certainly required to travel, his trip from home to the fixed designated pick up point exposed him to no more risk than anyone else on the road at that time who was commuting to work. The ALJ said it best when he noted that if this employment scenario stands for the proposition that travel is intrinsic to claimant's job, then the exception swallows the rule.²⁵

For these reasons, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.²⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated February 28, 2007, is affirmed.

²⁴ *Mendoza v. DCS Sanitation*, No. 96,548, 152 P.3d 1270 (Mar. 9, 2007).

²⁵ ALJ Order (Feb. 28, 2007) at 3.

²⁶ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of April, 2007.

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge